

Crab Rationalization Program

Summary of Regulation Changes in Response to Public Comments

This section provides a summary of the major changes made to the final rule in response to public comments submitted in response to the proposed rule to implement Amendments 18 and 19 to the Fishery Management Plan for Bering Sea and Aleutian Islands King and Tanner Crabs (69 FR 63200, October 29, 2004). All of the specific changes, and the reasons for making these changes, are contained in the preamble to the final rule under Response to Comments (70 FR 10174, March 2, 2005).

Harvester, Crew, and Processor Sectors

The following significant changes from the proposed to final rule in response to public comments are necessary to meet the requirements of Amendment 18 and 19. In the final rule NMFS:

(1) Revised the way in which Class A IFQ and Class B IFQ are allocated to individual IFQ holders who hold PQS or IPQ, or who are affiliated with PQS or IPQ holders, so that Class A IFQ is issued in proportion to the amount of IPQ that is held by the IPQ holder or affiliates.

(2) Revised the definition of “affiliation” to clarify the term “otherwise controls”.

(3) Clarified that CVC QS and IFQ are not subject to regional designation and the Class A and Class B IFQ assignment for the first three years of the program – until July 1, 2008.

(4) Revised the QS use caps that apply to non-individual PQS and IPQ holders so that the application of those caps considers the QS holding of that PQS and IPQ holder and the total QS holdings of all persons affiliated with that PQS or IPQ holder.

(5) Revised the PQS and IPQ use caps that apply to PQS and IPQ holders so that the PQS or IPQ holdings of that PQS or IPQ holder and the total PQS or IPQ holdings of all persons affiliated with that PQS or IPQ holder are used in the calculation of the PQS or IPQ holder’s caps.

(6) Clarified that an “individual and collective” rule applies for computing QS use caps for individual PQS holders, CDQ groups, and all other QS holders. This methodology sums all QS holdings by a person and the percentage of ownership by that person in any QS holding entity. This method is more consistent with Amendment 18.

(7) Added provisions on applying limits on the amount of “custom processing” that may be undertaken at any one processing facility, or at any facility, or group of facilities that is owned by an IPQ holder.

(8) Clarified the limited exemption that applies to using legal landings based on the activities of a vessel which received an LLP by transfer in order to remain in a fishery.

Crab Harvesting Cooperatives

In response to Council and public comments, NMFS removed the requirement in § 680.21 that crab harvesting cooperatives be formed under the Fishermen’s Collective Marketing Act (FCMA, 15 U.S.C. 512). With this change, QS holders that hold PQS and IPQ, as well as QS holders affiliated with PQS and IPQ holders, can participate in crab harvesting cooperatives. To address antitrust concerns, NMFS: (1) clarified that issuance of a crab

harvesting cooperative IFQ permit is not a determination that the crab harvesting cooperative is formed or is operating in compliance with antitrust laws; and (2) added that members of crab harvesting cooperatives, that are not FCMA cooperatives, should consult counsel before commencing any activity under the crab harvesting cooperative if members are uncertain about the legality under the antitrust laws of the crab harvesting cooperative's proposed conduct. Additionally, NMFS added definitions of crab harvesting cooperatives and FCMA cooperatives at § 680.2.

Additionally, NMFS changed the regulations at § 680.42(c)(5) so that a CVC or CPC QS holder is subject to the owner on board restriction regardless of whether he or she joins a crab harvesting cooperative. NMFS revised the final rule at § 680.21(a)(1)(iii)(B) to allow CVC QS holders who join a crab harvesting cooperative to withhold their Class B IFQ from submission to the crab harvesting cooperative. This will take effect after the third year of the Program when CVC QS becomes subject to the Class A/Class B IFQ split. NMFS revised the final rule at § 680.21(a)(1)(iii)(A)-(B) to permit QS holders to hold memberships in one crab harvesting cooperative per fishery. If a QS holder joins a crab harvesting cooperative for fishery, all of that QS holder's IFQ for that fishery will be submitted to the crab harvesting cooperative.

NMFS revised intercooperative transfers at § 680.21(e) to require the designation of the members of the crab harvesting cooperatives that are engaged in the transfer for purposes of applying the use caps of the members to the cooperative IFQ that is being transferred between the crab harvesting cooperatives.

ROFR

The final rule revises proposed provisions for an ECC's ROFR of purchase of PQS or IPQ that is being proposed by a PQS/IPQ holder for use outside the community. These revisions are in response to public comment and are intended to more closely reflect the original intent of the Council. First, the final rule clarifies that an ECC has discretion on whether or not to designate an ECC entity to represent it in ROFR and enter into civil contract arrangements for this purpose. If an ECC entity is not designated within a reasonable period of time, then the ECC permanently waives its opportunity to exercise ROFR. Second, statute terms for civil contracts establishing ROFR between eligible ECCs and holders of PQS/IPQ have been removed from the regulations. Instead, the regulations now refer to the provisions in § 313(j) of the Magnuson-Stevens Act. This approach ensures consistency with the Magnuson-Stevens Act and is appropriate because NMFS does not enforce these contract terms.

Arbitration System

NMFS made the following significant changes from the proposed to final rule in response to public comments. These changes are necessary to meet the requirements of Amendment 18 and 19. In the final rule NMFS:

- (1) Clarified that only IFQ holders can initiate the Binding Arbitration procedure.
- (2) Revised the timeline for the 2005 season for QS holders and PQS holders to join an Arbitration Organization which is responsible for selecting a group of experts that can assist in price negotiations: the market analyst, formula arbitrator, and contract arbitrator.

(3) Revised the mechanism for exchanging information between uncommitted IPQ holders and uncommitted Arbitration IFQ holders to allow for a third-party to provide data in an arms-length relationship.

(4) Established a minimum of 25 percent of the total IFQ held by an FCMA cooperative that must be committed to an IPQ holder in order to engage in share matching.

(4) Clarified the timing under which a Binding Arbitration procedure must occur and the process whereby it can occur.

(5) Clarified the ability of persons to participate in FCMA cooperatives and collectively negotiate, and the limits to which FCMA cooperatives may exchange information among cooperatives.

(6) Removed the requirement that the transferors require persons receiving QS/IFQ or PQS/IPQ by transfer to join an Arbitration Organization, and requiring the transferees to do that themselves.

(7) Required that CVO IFQ, CVC IFQ after July 1, 2008, and IPQ would not be issued for a crab QS fishery until the Market Analyst, Formula Arbitrator, or Contract Arbitrators have been selected for that fishery.

(8) Clarified the type of Arbitration Organization which a person must join depending on their holdings of QS/IFQ and PQS/IPQ.

Monitoring and Enforcement

NMFS made two major changes to requirements for CPs as a result of public comment. Both changes reduce the burden on participants in the crab fishery. First, NMFS reduced the required reporting interval for crab catch by CPs from once every twenty four hours to weekly. Second, NMFS removed requirements for CPs to provide an observer work area on board their vessels. NMFS also clarified regulations governing the use of the Interagency Electronic Reporting System (IERS) to ensure that vessels that are unable to use the Internet may report catch using an alternative, NMFS approved, method such as an email attachment to report catch.

Economic Data Collection

In response to public comment requesting additional time to prepare and submit the historic EDRs, the submission interval for the EDR is increased from 60 days to 90 days at §§ 680.6(a)(2), 680.6(c)(2), 680.6(e)(2) and 680.6(g)(2), to provide both the time to gather records and complete an accurate EDR. Also in response to public comment, the time interval allowed for verification of data by all submitters is extended in the final rule at § 680.6(i)(2) to 20 days from the 15 days interval identified in the proposed rule.

Cost Recovery and Fee Collection

The cost recovery fee system remains relatively unchanged from the proposed rule. NMFS received only one comment for the cost recovery fee system. NMFS responded affirmatively to this comment by adjusting the methodology by which CPs must calculate and submit fees to reduce any disparity between fees paid by CPs and shoreside processors. An explanation of the revised methodology for CP fee calculation is contained in the response to comments.